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In the Supreme Court of the United States

OCTOBER TERM, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

FRANK HENRY HABICHT II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a state court in North Dakota had jurisdiction over a suit brought by petitioner Indian Tribes against respondent, a non-Indian professional corporation organized under the laws of North Dakota with offices located in that State but outside the boundaries of the Tribes' Reservation, for negligent design of a water system constructed for the Tribes on the Reservation.

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INTEREST OF THE UNITED STATES

The Court invited the Solicitor General to file a brief at the petition stage expressing the views of the United States. The United States traditionally has participated amicus curiae in cases concerning the rights of Indians and Indian Tribes, because of the special obligation of the Federal Government with respect to Indian affairs and, in particular, matters occurring on Indian Reservations for which the Secretary of the Interior has responsibility.

STATEMENT

1. Petitioners, the Three Affiliated Tribes of the Fort Berthold Reservation, are organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. The Tribal Code establishes a Fort Berthold Indian Court, which at the time this suit arose had the following jurisdiction over civil matters (ch. II, § 1(a); Pet. 13):

> *Jurisdiction.* The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.[1]

This jurisdictional provision is essentially identical to that contained in Interior Department regulations, first promulgated in 1935 (see 25 C.F.R. Part 161 (1949)) and modified in 1957 (22 Fed. Reg. 10515, 10518-10519), conferring civil jurisdiction on the Courts of Indian Offenses established by the regulations for a number of reservations. 25 C.F.R. 11.1(a) and 11.22. See *Williams* v. *Lee*, 358 U.S. 217, 222 (1959); cf. 25 U.S.C. 229 and 230.[2]

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[1] On October 22, 1982, after the decision of the Supreme Court of North Dakota in this case, the Tribal Business Council amended the Tribal Code to grant the Tribal Court personal jurisdiction over non-Indians who reside, enter, or transact business within the territorial boundaries of the Reservation and subject matter jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation. See Resolution 82-192, adding Chapter 1, Sections 3.3 and 3.5, to the Tribal Code. These amendments were approved by the Secretary of the Interior, as required by the Tribal Constitution.

[2] These regulations contain a section governing choice of law in such suits, requiring the application of any laws or regulations of the United States that govern the cause and any ordinances or customs of the tribe not inconsistent with federal law. 25 C.F.R. 11.23(a). Where federal or tribal law does not cover the particular matter, the Courts of Indian Offenses are to apply the law of the State in which the matter in dispute lies. 25 C.F.R. 11.23(c). The regulations also provide for the payment of the judgment out of the Indian defendant's individual funds held by the Secretary if the defendant himself does not satisfy the judgment. 25 C.F.R. 11.26. These regulations continue to apply to any tribe organized under the Indian Reorganization Act until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective. 25 C.F.R. 11.1(d).

The choice of law provisions of the recently adopted amendments to petitioners' Tribal Code similarly provide for the applica-

2. Petitioners entered into a contract with respondent Wold Engineering for the design and construction of a water system for the Four Bears Village, located within the exterior boundaries of the Reservation. Wold is a professional corporation organized under the laws of North Dakota with offices located off the Reservation (Pet. 6-7). We have been informed by the Economic Development Administration of the United States Department of Commerce that the project was funded in substantial part by a public works project grant from EDA under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. 3131.

After construction of the water system was completed, petitioners brought this action in the District Court for Ward County, North Dakota, claiming that respondent negligently designed the system (Pet. App. 4a-5a). The district court, by judgment order, dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 1a, 3a).

3. The Supreme Court of North Dakota affirmed (Pet. App. 3a-10a). The Supreme Court acknowledged (Pet. App. 5a-6a) that North Dakota courts had exercised jurisdiction over certain civil actions involving Indians on an Indian reservation prior to the enactment of Public Law 280 in 1953.[3] However, the Court concluded that, "pursuant to Public Law 280" (Pet. App. 5a), the State of North Dakota, by a constitutional amendment adopted in 1958 and an implementing statute enacted in 1963,[4] had totally disclaimed jurisdiction over all civil causes of action arising on an Indian Reservation (Pet. App. 5a-7a). The Court also rejected the contention that de-

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tion of federal law where required and of tribal ordinances, resolutions, and customs, but provide for the application of State law only if agreed to by stipulation of the parties. Tribal Code, ch. 1, § 2.5.

[3] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

[4] N.D. Const. Art. XIII, § 1; N.D. Cent. Code Ann. § 27-19-01 (repl. 1978).

nying Indians access to state court to sue non-Indians, even though state courts are open to suits brought by non-Indian plaintiffs against non-Indian defendants concerning matters arising on the Reservation, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the provision of the North Dakota Constitution providing that the courts of that State shall be open to "every man."[5] The Court explained that because the United States Constitution permits the Federal Government to enact legislation singling out Indian Tribes and because North Dakota's disclaimer of jurisdiction was adopted pursuant to Public Law 280, no equal protection problem arises (Pet. App. 8a-10a).

SUMMARY OF ARGUMENT

A. The Supreme Court of North Dakota has closed the courts of that State to suits by an Indian or Indian Tribe against a non-Indian defendant concerning matters arising on Indian lands, even though such suits are not inconsistent with any federal statute and do not infringe upon the federally protected sovereignty of Indian Tribes. This decision is at odds with the longstanding view of this Court that suits by Indians against non-Indians are fully consistent with established principles governing the exercise of state power over matters affecting Indians and also are consistent with disclaimer clauses, such as those in the North Dakota Enabling Act and Constitution, which provide that Indian lands shall remain under the absolute jurisdiction and control of Congress.

Federal law and tribal sovereignty may operate to preempt state law in certain situations and thereby to confer on Indians and Tribes an immunity from state control. For this reason, suits in state court against an Indian defendant concerning reservation matters, whether brought by an Indian or non-Indian plaintiff, ordinarily are barred. But when an Indian chooses to sue in state

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[5] N.D. Const. Art. I, § 9; previously Art. I, § 22.

court for redress of wrongs, the State does not improperly impose its jurisdiction on the Indian by entertaining his suit—at least where, as here, the Tribe has not purported to vest exclusive jurisdiction over the matter in a tribal court or other tribunal. The Indian plaintiff has, in these circumstances, cast off whatever protective immunity federal law confers. Indeed, the decisions of this Court have regarded an Indian's access to state court as a basic civil right that he shares with non-Indians.

B. The North Dakota Supreme Court concluded that Public Law 280 authorized the State to disclaim jurisdiction over suits by Indians against non-Indians concerning matters arising on Indian lands, even though such suits were not barred by federal law prior to the enactment of Public Law 280. This conclusion is inconsistent with the text, legislative history, and judicial interpretation of Public Law 280, which make clear that the statute was intended to remove state law impediments to the assumption of *new* jurisdiction by the States, not to authorize them to disclaim jurisdiction that already was authorized by federal law. Even if Public Law 280 could be viewed as ambiguous in this regard, it must be liberally construed, doubtful expressions being resolved in favor of the Indians' longstanding right to sue in state court. In addition, a congressional intent to displace state jurisdiction will not lightly be inferred in any area in which States have long exercised jurisdiction.

C. The North Dakota Supreme Court's construction of the state constitutional and statutory provisions involved was premised on its erroneous view that Public Law 280 supported the disclaimer of jurisdiction it found in these provisions. That Court might well reach a different conclusion as a matter of state law if its misapprehension regarding the scope of Public Law 280 were corrected. Indeed, to bar Indians from access to state courts would raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. 1981.

ARGUMENT

THE STATE COURT WAS NOT REQUIRED OR AFFIRMATIVELY AUTHORIZED BY FEDERAL LAW TO DISMISS THE SUIT BY PETITIONER TRIBES AGAINST THE NON-INDIAN RESPONDENT FOR LACK OF JURISDICTION

A. State Jurisdiction Is Not Barred By Established Principles Governing The Exercise Of State Power In Matters Affecting Indians

1. The Enabling Act of Feb. 22, 1889 provided for the admission to the Union of North Dakota, as well as Montana, Washington, and South Dakota. Ch. 180, 25 Stat. 676. Section 4 of the Enabling Act required that the constitutions of these States provide, in terms "irrevocable without the consent of the United States and the people of said States," that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 677. *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), slip op. 9; *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 479-481 & n.23 (1979). Consistent with the requirements of the Enabling Act, the disclaimer language in Section 4 of that Act is incorporated in the North Dakota Constitution as part of an Article entitled "Compact with the United States."[6] Pet. App. 6a; compare *Arizona* v. *San Carlos Apache Tribe*, *supra*, slip op. 9. Similar language was included in the Enabling Acts and constitutions of a number of western States. *Id.* at 11, 14 & n.12. Nevertheless, "the presence or absence of specific jurisdictional disclaimers has rarely been dispositive in [this Court's] consideration of state jurisdiction over Indian affairs or activities on Indian lands" (*id.* at 15). Instead, the disclaimers have been viewed essentially as an expression of generally applicable principles governing state jurisdiction in Indian matters (*id.* at 15-17).

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[6] Art. XIII, § 1; previously Art. XVI, § 203.

As we explain below, this Court consistently has viewed the right of an Indian to have access to state court to sue a non-Indian as a basic civil right that Indians share in common with non-Indians (see also 42 U.S.C. 1981; page 26-27, *infra*), and it repeatedly has made clear that such suits concerning matters arising on Indian lands are fully consistent with accepted principles limiting the exercise by the States of jurisdiction over Indians. For the most part, the Court has reiterated this rule in cases arising in States that have disclaimer clauses in their Enabling Acts and constitutions, thereby establishing that such suits are fully consistent with disclaimer clauses such as those in the North Dakota Enabling Act and Constitution.

In *Felix* v. *Patrick*, 145 U.S. 317 (1892), the Court observed with respect to the Indian plaintiffs: "It is scarcely necessary to say in this connection that, while until [they accepted allotments under the applicable treaty] they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color." 145 U.S. at 332.[7] Three decades later, in *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926), the Court held that a New Mexico state court had jurisdiction to entertain a suit brought by the Indian Pueblo

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[7] Citing *Blue-Jacket* v. *Commissioners of Johnson County*, 3 Kan. 299 (1865), rev'd on other grounds *sub nom. The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Swartzel* v. *Rogers*, 3 Kan. 374 (1865); *Wiley* v. *Keokuk*, 6 Kan. 94 (1870).

In *The Kansas Indians*, the Court noted that the Indians there involved, who maintained tribal relations and whose lands were held to be exempt from taxation, "seek the courts of Kansas for the preservation of rights and the redress of wrongs" (72 U.S. (5 Wall.) at 758). As the Court observed (*id.* at 740), the Enabling Act for Kansas contained a disclaimer clause. Act of Jan. 21, 1861, ch. 20, 12 Stat. 126; see *Arizona* v. *San Carlos Apache Tribe*, *supra*, slip op. 15. Although the Court's opinion in *The Kansas Indians* does not disclose the other situations in which Indians had sought redress in state court, the controversy in *The Kansas Indians* itself, brought by Indians in Kansas courts, concerned the lands on which the Indians resided.

of Laguna against non-Indians to quiet title in the Pueblo to land that was subject to restrictions on alienation under the Trade and Intercourse Act of 1834.[8] This was despite the fact, not adverted to by the Court, that the Enabling Act for the admission of New Mexico to the Union required the state constitution to provide that absolute jurisdiction and control of Indian lands, including that of the Pueblo Indians, were to be in the Congress of the United States. Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558. See *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913).

The Court reiterated this rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). There the Court held that an Arizona state court did not have jurisdiction over a suit brought by a non-Indian owner of a store on the Navajo Indian Reservation against two Navajo Indians to collect for goods sold to them on credit; the suit instead had to be brought in the tribal court, which had been granted jurisdiction over suits by outsiders against Indian defendants. 358 U.S. at 222. Yet, even while so ruling, the Court reaffirmed the principle that Indians may sue outsiders in state court (*id.* at 219-220, citing *Felix* v. *Patrick* and *United States* v. *Candelaria*, *supra*), and it did so while acknowledging that the State of Arizona, where the case arose, is subject to an express disclaimer of jurisdiction over Indian lands in its Enabling Act and state constitution (358 U.S. at 223 n.10; Act of June 20, 1910, ch. 310, 36 Stat. 569).

The Court observed in *Williams* v. *Lee* that the "broad principles" of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)—which the Court characterized as an instance in which the State of Georgia "sought to impose [its] laws and courts on the Indians" (358 U.S. at 218)—have come to be accepted as law (*id.* at 219). But the Court explained that within these broad principles, state jurisdic-

[8] Rev. Stat. 2116 (1878 ed.), Trade and Intercourse Act of 1834, ch. 161, Section 12, 4 Stat. 730, as extended to New Mexico by the Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.

tion has been recognized "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized"; "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 219, 220). Suits by Indians against non-Indians in state courts were cited as an example of the exercise of state jurisdiction that did not infringe on that right. *Id.* at 219. Moreover, by citing for this proposition not only *Felix* v. *Patrick*, but also *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948)—which held that Indians have a right to vote in Arizona—the Court in *Williams* v. *Lee* again viewed the right of access to state courts as a fundamental right that Indians share in common with all other persons in the State.

The Court reaffirmed these principles once again in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). The Court there held that the State of Arizona could not tax the reservation income of an Indian residing on the Navajo Reservation. But the Court nevertheless twice reiterated that suits by Indians against outsiders in state court are consistent with the principles announced in *Williams* v. *Lee* governing the accommodation of federal, state, and tribal jurisdiction on an Indian reservation (411 U.S. at 171, 173), even while acknowledging the disclaimer of jurisdiction over Indian lands contained in the Enabling Act for Arizona and other States (*id.* at 175-176 & n.14). Indeed, *McClanahan* itself was a suit filed by an Indian in state court in a disclaimer State concerning matters arising on the Reservation, and the propriety of the exercise of jurisdiction by the state courts was never questioned, even though the tax at issue was struck down. See also *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982); *The Kansas Indians*, *supra*.

Moreover, the Court in *McClanahan* once again viewed the right of access to state courts as a right that In-

dians share along with other citizens of the State, just like the right of Indians to vote[9] and to receive some state services. 411 U.S. at 172-173. See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 371 (1968), quoting *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 459 (10th Cir. 1951) (noting that *Candelaria* and other decisions "clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands"); 390 U.S. at 370-371, quoting *Brown* v. *Anderson*, 61 Okla. 136, 138-139, 160 P. 724, 726 (1916)[10]; *Bonnet* v. *Seekins*, 126 Mont. 24, 243 P.2d 317 (1952).

The supreme courts of other States also have recognized the right of Indians, like other citizens, to have access to state courts to bring suits against non-Indians concerning matters arising on a reservation. *Whiting* v. *Hoffine*, 294 N.W.2d 921, 923-924 (S.D. 1980); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Red Hawk* v. *Joines*, 129 Or. 620, 278 P. 572 (1929). See also *Johnson* v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 395, 631 P.2d 548, 550 (Ct. App.), cert. denied, 454 U.S. 1025 (1981); F. Cohen, *Handbook of Federal Indian Law* 351, 355 (1982).[11]

2. This Court's cases establish that, absent an Act of Congress so providing, reservation Indians may not be

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[9] Once again citing *Harrison* v. *Laveen*, *supra*. See 411 U.S. at 173 & n.10.

[10] "Osborne Anderson, the defendant in error, although a full blood Indian, was a citizen of the United States and of the State of Oklahoma. No good reason appears why he should be denied the privilege of appealing to the courts of the state the same as any other citizen to enforce his rights to property, even though such property be land upon which restrictions against alienation have been imposed by an act of Congress."

[11] The legal principles announced in *Williams* v. *Lee* regarding jurisdiction over suits between Indians and non-Indians also were reiterated in *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976), and *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971).

sued in state court for matters arising on the reservation, because to do so would interfere with the right of tribal self-government—especially where, as in *Williams* v. *Lee*, the tribal court has jurisdiction over such disputes. See also *Fisher* v. *District Court*, 424 U.S. 382, 383, 386-389 (1976); *Kennerly* v. *District Court*, 400 U.S. 423, 425 (1971). The state courts may not "impose their * * * courts on the Indians" in this fashion (*Williams* v. *Lee*, *supra*, 358 U.S. at 218), which might "jeopardize[]" the rights of Indians by permitting them to be haled into often hostile state courts (*id.* at 219). This policy of deference to the mechanisms adopted by the tribes—or by the Secretary on their behalf (25 C.F.R. 11.22)—for the redress of grievances against tribal members is of long standing, as reflected in Sections 17 and 18 of the Trade and Intercourse Act of 1834 (ch. 161, 4 Stat. 731 and 732), now codified at 25 U.S.C. 229 and 230.

The test under *Williams* v. *Lee* and related cases for determining whether the exercise of jurisdiction by state courts over causes of action arising on an Indian reservation is preempted—*i.e.*, whether there is governing federal legislation and, if not, whether the state action would infringe on the right of reservation Indians to make their own laws and to be ruled by them—is essentially the same as the preemption test applied by this Court in Indian cases generally. In other cases, the Court has recognized two " 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 4-5, quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). In discussing these principles last Term, the Court noted that federal statutes or tribal sovereignty may establish an "immunity" or "sovereign immunity" from the application of state law, preventing the "imposition" of that law

upon the Indians. *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 6, 7, 8, 12. See also *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 8, quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) ("'historic immunity from state and local control'"). So also, under *Williams* v. *Lee* and its progeny, federal law or principles of inherent tribal sovereignty may preempt the exercise of jurisdiction by state courts, and thus confer a protective "immunity" from the coercive "imposition" of that jurisdiction over Indians concerning matters on the reservation.

But, at the same time, as we have explained, this Court's cases also consistently have recognized the right of an Indian to sue a non-Indian in state court. This implements the principles of *Williams* v. *Lee* and this Court's preemption cases generally. When an Indian voluntarily invokes the jurisdiction of the state court, the State does not "impose" its courts on the Indians. Although it is true that the state might be hostile to the Indian's position when he is the plaintiff, just as when he is the defendant, the Indian plaintiff who submits his cause to the state courts may be said to have cast off his "immunity" from the jurisdiction of those courts concerning on-reservation matters and voluntarily accepted the risk of a hostile reception. And at least where the tribe has not sought to exercise its inherent sovereign powers by conferring exclusive jurisdiction on its tribal courts over suits by Indians against non-Indians with regard to contract disputes or similar reservation matters affecting the tribe or its members (see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982)), the exercise of jurisdiction by the state courts does not impermissibly interfere with tribal sovereignty or self-government.[12]

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[12] When this case was filed and when the district court's dismissal for lack of jurisdiction was affirmed, the Tribal Court

This is especially so, as in the instant case, when it is the tribe itself that has brought the action in state court. In such a case, the tribe may be held to have determined for itself that submitting the matter to state court is consistent with tribal interests. Indeed, the ability of a tribe to bring suit to recover for damage to important reservation facilities caused by outsiders substantially *furthers* the interests of tribal sovereignty. "Indians are entitled 'to take their place as independent qualified members of the modern body politic.' *Poafpybitty* v. *Skelly Oil Co.*, *supra*, 390 U.S. at 369, quoting *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943). Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged." *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 8.

Moreover, unlike in the case of claims *against* Indians, for which an Act of Congress and Interior Department regulations embody a policy of deference to tribal mechanisms for their resolution (see page 11 & note 2, *supra*), there are no federal statutes or regulations that reflect a comparable policy that could be said to preclude suits

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did not have jurisdiction over civil actions brought against non-Indians, except by stipulation of the parties. The October 22, 1982 amendment to the Tribal Code giving the Tribal Court jurisdiction over suits against non-Indians arising on the Reservation does not suggest that this jurisdiction was intended to be exclusive, rather than concurrent with that of the state courts. There thus is no occasion in this case to consider the circumstances under which an assertion by the Tribe of exclusive jurisdiction over certain controversies would oust state courts of jurisdiction. Cf. *Kennerly* v. *District Court*, *supra*, 400 U.S. at 425-426. Compare *Fisher* v. *District Court*, *supra*, 424 U.S. at 384 n.5, 389; see also *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59-60, 65. In *Kennerly*, the governing statutes regarding the assumption by a State of civil jurisdiction—Public Law 280 and Title IV of the Civil Rights Act of 1968—did not permit the suit against Indians in state court there at issue (400 U.S. at 427-429), irrespective of whether such a suit would impermissibly infringe upon tribal self-government in light of the tribal ordinance recognizing concurrent jurisdiction in the tribal and state courts over suits against Indians (*id.* at 425).

by Indians against non-Indians in state court. And where the tribal court does not have jurisdiction of the matter, the effect of a holding that the state courts likewise do not have jurisdiction would be to deprive the Indian plaintiff of any forum for resolution of the matter, unless the contract or other dispute could be said to arise under federal law for purposes of federal question jurisdiction under 28 U.S.C. (Supp. V) 1331 [13] or unless the requirements for federal diversity jurisdiction were satisfied, 28 U.S.C. 1332. In the present case, for example, the Tribal Court did not have jurisdiction over the Tribes' dispute with respondent either when the complaint was filed or when the dismissal for lack of jurisdiction was affirmed by the North Dakota Supreme Court. By contrast, in *Fisher* v. *District Court*, *Kennerly* v. *District Court*, and *Williams* v. *Lee*, the result of the decision

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[13] A suit brought to enforce rights conferred by tribal law would not appear to be one arising under federal law for purposes of the jurisdiction of federal district courts under 28 U.S.C. (Supp. V) 1331. See *Gila River Indian Community* v. *Henningson*, 626 F.2d 708, 714-715 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); see also *Mescalero Apache Tribe* v. *Martinez*, 519 F.2d 479 (10th Cir. 1975). Cf. *United States* v. *Wheeler*, 435 U.S. 313 (1978); but cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 682 n.16 (1974). There is, however, no reason why state courts may not apply tribal substantive law in suits within their jurisdiction. See, *e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899); *United States ex rel. Mackey* v. *Coxe*, 59 U.S. (18 How.) 100 (1855). Cf. 25 U.S.C. 1322(c); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 66 n.21, citing *United States ex rel. Mackey* v. *Coxe*, *supra*.

It also is not clear to what extent, if any, the instant suit would be governed by federal law, by virtue of the participation by the Economic Development Administration in the project. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). Of course, even if federal law applied because of substantial federal involvement in the Indian transaction at issue, the applicable federal rule of decision might in appropriate circumstances be adopted from tribal or state law. *United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 727-740; *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671-676. Cf. 25 C.F.R. 11.23(a) and (c); note 2, *supra*.

barring state court jurisdiction was not to deny a forum for the lawsuit, because the tribal court did have jurisdiction over the matter in controversy.

B. Public Law 280 Did Not Authorize The State Of North Dakota To Disclaim Jurisdiction That Previously Had Not Been Barred By Federal Law

1. As we have explained in Point A, this Court repeatedly has made clear that a state court is not barred from entertaining a suit brought by an Indian plaintiff against a non-Indian defendant arising out of matters occurring on an Indian reservation or other Indian lands. Such suits are fully consistent with established principles limiting the power of the States to impose their laws on Indians and with the disclaimer clauses implementing that tradition, such as those in the North Dakota Enabling Act and State Constitution of 1889.

Indeed, the North Dakota Supreme Court acknowledged in this case that it too previously had held that the courts of North Dakota retained residuary jurisdiction over suits brought by Indians concerning certain matters arising on Indian reservations, notwithstanding the disclaimers in its Enabling Act and 1889 Constitution (Pet. App. 6a, citing *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957)). In *Vermillion*, the court had relied on Article I, Section 22 of the North Dakota Constitution (now Art. I, § 9), which provides that the courts of the State shall be open to "every man" (85 N.W.2d at 438), and had acknowledged the general rule in other States that Indians, as citizens, have a right to sue in state court (*id.* at 436-438).[14] But the court held

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[14] In *Vermillion*, the Supreme Court of North Dakota held that it had jurisdiction over a suit by one Indian against another for damages arising out of an automobile accident on the Standing Rock Indian Reservation. The Court held that the suit was not barred by the disclaimer clauses in the Enabling Act and State Constitution, on the ground that these clauses do not bar suits that do not have any relation to Indian lands (85 N.W.2d at 437, 438). The particular holding in *Vermillion* could not survive this Court's

that a different result was required in this case because of an intervening amendment to the disclaimer clause in the North Dakota Constitution and a state statute implementing that constitutional amendment—both of which, according to the North Dakota Supreme Court, were adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a, 7a).

In Section 6 of Public Law 280, Congress provided that, "[n]otwithstanding the provisions of any Enabling Act for the admission of a State," the consent of the United States is given to the people of any State to amend its State constitution or statutes "to remove any legal impediment to the assumption of civil and criminal jurisdiction" in Indian country. 67 Stat. 590. The 1958 amendment to the State Constitution, relied upon by the North Dakota Supreme Court, retained the original disclaimer clause representing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The 1958 amendment simply added a proviso to that language stating "that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress * * *." See Pet. App. 6a-7a.[15] In 1963, "under the authority of Public Law 280" and the amendment to the State Constitu-

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subsequent decisions in *Williams* v. *Lee*, *Kennerly* v. *District Court*, and *Fisher* v. *District Court*, *supra*, because the resolution of disputes between tribal members that arise on the reservation is at the core of the right of tribal self-government with which a State may not interfere. However, the rule that suits in state courts between Indians concerning matters arising on the reservation are barred in these circumstances does not undermine the force of the reasoning in *Vermillion* that state courts must remain open to exercise jurisdiction over suits by Indians that are *not* preempted by federal law because they are not inconsistent with the overriding federal policy of preserving tribal sovereignty or with a federal statute (such as a disclaimer clause) barring such jurisdiction.

[15] Art. XIII, § 1; previously Art. XVI, § 203.

tion (Pet. App. 7a), the North Dakota legislature amended the State's Civil Code to provide for what was entitled the "Assumption of Jurisdiction." N.D. Cent. Code Ann. § 27-19-01 (repl. 1978). This section of the Code states:

> In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the State of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided in this chapter.

2. The North Dakota Supreme Court concluded in this case that by the amendment to the disclaimer clause of the State Constitution and the enactment of the implementing state statute, "the people and the legislature of the State have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment" (Pet. App. 7a, quoting *In re Whiteshield*, 124 N.W.2d 694, 696 (N.D. 1963)). Accordingly, because the petitioner Tribes have not formally accepted state jurisdiction,[16] the Court held (Pet. App. 7a) that any jurisdiction over civil causes of action that previously had existed in the North Dakota courts had been withdrawn (*ibid.*).

This conclusion is difficult to square with the text of the state constitutional and statutory provisions involved. The 1958 amendment to the North Dakota Constitution retained the standard disclaimer language that, as we have shown in Point A, does not bar suits by Indians against non-Indians in state court. The 1958 amendment simply added a proviso to this disclaimer, which itself suggests that the amendment was intended only to *limit* the reach of the disclaimer clause, not expand

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[16] Such tribal consent now also is required by 25 U.S.C. 1322(a), enacted as part of the Civil Rights Act of 1968, Pub. L. No. 90-284, Section 402(a), 82 Stat. 79.

it. Moreover, the proviso speaks of the "acceptance" by the state legislature of jurisdiction that may be "delegated" to the State by Congress. This language bespeaks an intent to establish a procedure for the receipt of new jurisdiction conferred by Congress that previously was foreclosed by federal law, not to disclaim previously existing state jurisdiction. State court jurisdiction to entertain suits by Indians against non-Indians was not "delegated" by Congress in Public Law 280 (compare *Rice* v. *Rehner*, *supra*, slip op. 17-18); it is an aspect of state power that never was displaced by the disclaimer clauses or other federal laws or policies.

Similarly, the state statute implementing the proviso to the disclaimer clause provides that, "[i]n accordance with the provisions of Public Law 280" and the state constitutional provision, state civil jurisdiction shall be "extended" to "all civil causes of action" arising on Indian reservations upon the consent of the Indians. This language suggests only the possible acquisition of *additional* jurisdiction, so that state jurisdiction would be all-inclusive. There is no suggestion in the statute of an intent to withdraw any preexisting state court jurisdiction.[17]

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[17] The Court explained in the instant case (Pet. App. 7a) that following the amendment to the disclaimer clause in the State Constitution, the Court had overruled *Vermillion* v. *Spotted Elk*, *supra*, in *In re Whiteshield*, *supra*. The latter case involved an action in state court for the termination of parental rights where all the parties were Indians—a suit, like *Vermillion* itself, over which state court jurisdiction was preempted by federal law because such jurisdiction would interfere with tribal sovereignty. Cf. *Fisher* v. *District Court*, *supra*. Consistent with this federally imposed limitation on state jurisdiction that could be overcome only by compliance with Public Law 280, the North Dakota Civil Code provisions implementing Public Law 280 stated that the "civil jurisdiction herein accepted" by the State (when approved by the Indians) shall include the determination of parental rights. The Court relied upon this state statutory provision in *In re Whiteshield* (124 N.W.2d at 698, quoting N.D. Cent. Code Ann. § 27-19-8 (repl. 1978)), and quite properly viewed such jurisdiction as completely disclaimed by the State until formally accepted by it pursuant to Public Law 280. But this conclusion does not support the North Dakota Supreme

3. The holding by the North Dakota Supreme Court in this case also cannot be squared with the text and purposes of Public Law 280. Because the North Dakota Supreme Court explicitly held that the state constitutional amendment and implementing statute were adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a, 7a), the Court's holding that the constitutional amendment and statute effected a complete disclaimer of jurisdiction over the instant suit necessarily rests on the premise that Public Law 280 authorized such a disclaimer. This premise is mistaken. There is no indication that in enacting Public Law 280, Congress intended to oust state courts of any jurisdiction—such as that over suits by Indians against non-Indians—which theretofore was not barred by federal law. Nor is there any indication that Congress intended Public Law 280 to be an affirmative authorization for the States, in their discretion, to close their courts to suits by their Indian citizens

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Court's holding in this case that state jurisdiction that was *not* barred by the state constitutional disclaimer before the proviso was added (or by other federally imposed limitations) also was disclaimed by constitutional amendment and implementing statute. As explained in the text, the terms of the amendment and statute would appear to be addressed only to the acceptance of additional jurisdiction by the State.

Two other of the prior decisions of the North Dakota Supreme Court cited in the decision below (Pet. App. 7a) as precedent for its holding that the state court did not have jurisdiction in this case involved suits against Indians arising out of on-reservation activities that likewise would be barred by federal law, under the rationale of *Williams* v. *Lee* and *Kennerly* v. *District Court*. See *Nelson* v. *Dubois*, 232 N.W. 2d 54 (N.D. 1975), and *Gourneau* v. *Smith*, 207 N.W. 2d 256 (N.D. 1973). It apparently was not until 1981 that the North Dakota Supreme Court had occasion to consider whether an Indian could sue a non-Indian in state court with respect to a matter arising on the reservation. *See United States ex rel. Hall* v. *Hansen*, 303 N.W. 2d 349 (N.D. 1981), in which the court held that such a suit could not be brought. Even then, the issue arose in the context of whether the trial court could consider the counterclaim filed by the non-Indian defendant against the Indian plaintiff after the Indian plaintiff withdrew his complaint (*id.* at 350).

and tribes where such suits are not independently barred by federal law or would not impermissibly infringe upon the federally protected sovereignty of the Tribes. To the contrary, as we explain below, the entire thrust of Public Law 280 was to facilitate the assumption of new jurisdiction by the States.

a. The text of Public Law 280 does not support the decision of the North Dakota Supreme Court in this case. Section 4 of the Act provided that each of five named States[18] would immediately have civil jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country * * * to the same extent that such State * * * has jurisdiction over other civil causes of action * * *." Act of Aug. 15, 1953, 67 Stat. 589, 28 U.S.C. (& Supp. V) 1360. Obviously, Section 4 did not oust these five States of any jurisdiction or authorize them to disclaim jurisdiction over the very areas of Indian country in which Congress intended them to have *complete* civil jurisdiction automatically upon the passage of Public Law 280.[19]

North Dakota was not one of the five States for which an automatic vesting of all civil jurisdiction was accomplished by Section 4 of Public Law 280. Instead, because of the disclaimer clause in its Enabling Act and State Constitution, North Dakota is governed by Section 6 of Public Law 280 (67 Stat. 590),[20] which provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be,

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[18] California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska later was added to the list.

[19] Subsection (b) of Section 4, 28 U.S.C. 1360(b), contains certain limitations on the exercise of state civil jurisdiction, but those limitations are not at issue here.

[20] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 474.

> to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Nothing in this Section suggests a congressional intent to oust the States of jurisdiction that theretofore had not been barred by federal law or to authorize the States to disclaim any such jurisdiction. Section 6 speaks instead of the "assumption" of jurisdiction—which connotes a transfer of *new* jurisdiction from the federal government to the States—and the removal of "impediments" to that assumption contained in the Enabling Act or state constitution. The purpose of Section 6 was to provide a mechanism whereby States such as North Dakota could place themselves on an equal footing with the five States that acquired jurisdiction automatically under Section 4 of the Act, which, as we have explained, clearly did not permit the affected States to disclaim jurisdiction.

In addition, as we also have explained (see pages 7-10, *supra*), the disclaimer clauses in the Enabling Acts and state constitutions of North Dakota and other states were not "impediments" to the exercise of jurisdiction by state courts over civil suits brought by Indians against non-Indians with respect to matters arising on a reservation. The authorization in Section 6 of Public Law 280 for States to remove disclaimer clause "impediments" therefore was not necessary for these States to continue to exercise that jurisdiction. As a result, Section 6, the section of Public Law 280 applicable to North Dakota, has no bearing on the issue in this case. That provision plainly did not diminish State jurisdiction; nor can Section 6 be read as an affirmative authorization for a State to adopt new impediments to the exercise of jurisdiction.

The foregoing interpretation of Section 6 is reinforced by Section 7 of Public Law 280 (67 Stat. 590), which provided that as to the other "option" States, for which there is not a disclaimer in the Enabling Act or state constitution (*ibid.*; emphasis added):

> The consent of the United States is hereby given to any other State *not having jurisdiction* with respect to * * * civil causes of action * * * as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State, shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Once again, this provision addressed only those situations in which the States did not already have jurisdiction. Section 7 of Public Law 280 was repealed by Section 403(b) of the Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(b). However, 25 U.S.C. 1322(a), enacted as Section 402(a) of the Civil Rights Act of 1968 (82 Stat. 79)—which now governs the assumption of jurisdiction by all States, including North Dakota, that had not acquired jurisdiction pursuant to Public Law 280 prior to 1968—is written in similar terms that grant the consent of the United States to any State "not having jurisdiction" over civil causes of action to assume such jurisdiction. There is no expression of an intent to disturb state jurisdiction that already was permissible under federal law.

b. Nor does the legislative history of Public Law 280 support the interpretation given the Act by the North Dakota Supreme Court. That history repeatedly refers to the Act as providing for an "extension" or "transfer" of civil jurisdiction to the States, thereby confirming Congress' purpose to facilitate an assumption of *new* jurisdiction by the States. See, *e.g.*, H.R. Rep. No. 848, 83d Cong., 1st Sess. 6, 7 (1953)[21]; S. Rep. No. 699, 83d

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[21] The House Report also refers (*id.* at 5, 7) to civil jurisdiction "over Indians," which suggests jurisdiction in suits in which Indians are *defendants*.

Cong., 1st Sess. 5-7 (1953); *Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 13, 17, 18, 22 (June 29, 1953) (unpublished, but lodged with the Clerk of this Court); *id.* at 1, 11 (July 15, 1953).[22]

This Court's decisions likewise describe Public Law 280 as designed to accomplish a transfer of jurisdiction to, and assumption of jurisdiction by, the States. See, *e.g.*, *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965); *Kennerly* v. *District Court*, *supra*, 400 U.S. at 427, 428, 429[23]; *McClanahan* v. *Arizona State Tax Commisison*, *supra*, 411 U.S. at 177-178; *Fisher* v. *Dis-*

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[22] This same view is reflected in the legislative history of the Civil Rights Act of 1968, which amended Public Law 280. See, *e.g.*, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are not "subjected" to state courts before they are ready); *id.* at 27, 32, 38, 91 (discussing *Paiz* v. *Hughes*, *supra*, in which an Indian sued a non-Indian), 104, 108-109, 115-116, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968), *id.* at 5520 (Presidential message).

[23] In *Kennerly*, the Court observed that at the time the case arose, "[w]ith regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country," there was a governing Act of Congress, Public Law 280. 400 U.S. at 427, quoted in *Bryan* v. *Itasca County*, 426 U.S. 373, 386 (1976). *Kennerly*, however, involved a suit against an Indian by a non-Indian. The reference to suits brought *by* Indians therefore was dictum, even assuming that it was made with reference to the type of suit involved here. There was, moreover, no reference in *Kennerly* to the prior cases sustaining state jurisdiction over suits brought by Indians against non-Indians. In addition, it would be inconsistent with the Court's use of the phrase "extension of state jurisdiction" to read the passage in the Court's opinion to suggest that Congress withdrew then-existing jurisdiction over certain causes of action until the new procedural requirements of Public Law 280 were satisfied.

trict Court, supra, 424 U.S. at 388, 389; *Bryan* v. *Itasca County*, 426 U.S. 373, 381, 385, 386 (1976); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475, 483, 484, 485, 486 & n.29, 490, 491, 492 n.36, 493, 495, 497, 499 (1979); *Arizona* v. *San Carlos Apache Tribe, supra*, slip op. 13. Cf. *Rice* v. *Rehner, supra*, slip op. 20 n.17.

It would be inconsistent with the purpose of Public Law 280 of facilitating the exercise by the States of jurisdiction over all civil causes of action arising on Indian reservations [24] to interpret that law to impose or authorize a new impediment to the exercise of jurisdiction over suits that state courts already were permitted by federal law to entertain. Cf. *Rice* v. *Rehner, supra*, slip op. 9. Indeed, in *Williams* v. *Lee* and *McClanahan* v. *Arizona State Tax Commission, supra*, in which Public Law 280 was specifically discussed, the Court reiterated the long established rule, drawn from *Felix* v. *Patrick* and *United States* v. *Candelaria, supra*, that Indians may sue non-Indians in state court, without any suggestion that the enactment of Public Law 280 had withdrawn that jurisdiction from the States or authorized the States to disclaim it.[25]

But even if the civil jurisdiction provisions of Public Law 280 were thought to be ambiguous with regard to their effect on suits by Indians against non-Indians, this Court has made clear that the construction of Public Law

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[24] See *Washington* v. *Yakima Indian Nation, supra*, 439 U.S. at 490-491.

[25] Similarly, when Congress enacted 28 U.S.C. 1362 in 1966 to give federal courts jurisdiction over suits by recognized Tribes arising under federal law without regard to the amount in controversy, the assumption was that such suits otherwise would be brought in state court, if at all. S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); 112 Cong. Rec. 20769 (1966). It is instructive that the suit cited in the legislative history as an example of the type of suit for which the statute was designed, *Yoder* v. *Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), arose in Montana, a disclaimer state, after the enactment of Public Law 280.

280 is to be "guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918)." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Without a clear expression of congressional intent, Public Law 280 cannot, consistent with this principle of statutory construction, be interpreted to authorize the abrogation of the fundamental and long-recognized right, possessed by Indians along with non-Indians, to have access to state courts for redress of wrongs. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 382.

C. A Construction Of The State Constitutional And Statutory Provisions That Barred State Court Jurisdiction Over A Suit By An Indian Against A Non-Indian Would Raise A Substantial Constitutional Question

The holding by the North Dakota Supreme Court that the people and legislature of the State have disclaimed jurisdiction over suits such as that at issue here rested on its view that Public Law 280 authorized that disclaimer. Accordingly, it is entirely possible that the Supreme Court of North Dakota, on remand, would construe the proviso to the state constitutional disclaimer and the state statute implementing that proviso not to bar jurisdiction over the instant case if this Court were to hold, as we submit, that Public Law 280 did not authorize the State to disclaim that jurisdiction. The Supreme Court also might be led to that view by a reaffirmation by this Court of its longstanding view that such suits are fully consistent with established limitations on the exercise of state authority over Indians and with disclaimer clauses such as those applicable to North Dakota, and that the right of access to state courts is a

basic civil right that Indians share in common with non-Indians.

Indeed, a contrary construction of the state constitution and implementing statute would, in our view, raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The effect of such a holding would be that a State may deprive Indians of the fundamental right of access to state courts without any authorization given by the federal government in furtherance of an overriding federal policy regarding Indian affairs that might make an ouster of state jurisdiction appropriate. Compare *Plyer* v. *Doe*, 457 U.S. 202, 219 n.19, 224-226 (1982).

In *Washington* v. *Yakima Indian Nation*, *supra*, the Court reaffirmed that the unique legal status of Indian Tribes under federal law permits the federal government to enact legislation singling out Indian Tribes, even though that legislation might otherwise be constitutionally infirm. 439 U.S. at 500-501, citing *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Court stressed, however, that "States do not enjoy this same unique relationship with Indians" (439 U.S. at 501). The Court sustained the state jurisdictional statute there at issue because the Court found that it was enacted in response to Public Law 280 and was within the scope of the authorization granted by that law. 439 U.S. at 501. In this case, by contrast, Public Law 280 did not purport to authorize the State of North Dakota to disclaim any pre-existing jurisdiction over suits by Indians against non-Indians. Nor did the Supreme Court of North Dakota articulate any independent state policy in support of barring access to state courts by Indians to sue non-Indians who otherwise are amenable to suit in the courts of the State. Moreover, quite aside from the question it raises under the Equal Protection Clause, the decision of the Supreme Court of North Dakota would appear to conflict with 42 U.S.C. 1981, which provides: "All persons

within the jurisdiction of the United States shall have the same right in every State and Territory * * * to sue * * * as is enjoyed by white citizens." [26]

The Court may wish to refrain from resolving these difficult questions here, however, since the interpretation below of the state constitutional and statutory provisions was premised on an erroneous understanding of the scope of Public Law 280. This misinterpretation affected the North Dakota Supreme Court's disposition of the constitutional question as well: that Court relied upon *Washington* v. *Yakima Indian Nation*, *supra*, for the proposition that there was no equal protection violation because Congress, in Public Law 280, authorized the state to disclaim jurisdiction over the case (see Pet. App. 9a). And, finally, the North Dakota Supreme Court did not discuss the impact of 42 U.S.C. 1981. The Court therefore may wish to remand for further proceedings on these questions and to provide the Supreme Court of North Dakota with an opportunity to reconsider the meaning of the state constitutional and statutory provisions with further guidance regarding the backdrop of applicable federal law.

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[26] As first enacted in Section 1 of the Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, this protection applied only to persons whom that Section declared to be citizens, from which "Indians not taxed" were excluded. This exclusion was not carried forward in Section 16 of the Act of May 31, 1870, ch. 114, 16 Stat. 144, from which 42 U.S.C. 1981 is derived.

CONCLUSION

The judgment of the Supreme Court of North Dakota should be vacated insofar as it rests on that Court's interpretation of Public Law 280 as requiring or authorizing a disclaimer by the State of jurisdiction over this suit, and the case should be remanded for further proceedings regarding the interpretation of the State Constitution and statute, consistent with the views expressed herein.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANK HENRY HABICHT II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

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